FILED

941297 JAN 31 1995

OFFICE OF THE CLERK

No. ____

In The

Supreme Court of the United States

October Term 1994

THOMAS J. LONGO, DAVID E. MACK, NANCY J. MARINCIC, ROSE MARIE LOVANO, JOSEPH SUSTER, MICHAEL ABELLA, and WILHELM G. SPIEGELBERG, in Their Individual Capacities,

Petitioners,

vs.

GEORGE ZILICH,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

ALAN E. JOHNSON
Counsel of Record
LEO R. WARD
WARD & ASSOCIATES, A LEGAL PROFESSIONAL ASSOCIATION
1265 West 6th St., 4th Floor
Cleveland, Ohio 44113
(216) 241-0515

MARCIA E. HURT
FREDERICK W. WHATLEY
R. TODD HUNT
WALTER, HAVERFIELD, BUESCHER & CHOCKLEY
1215 Terminal Tower
Cleveland, Ohio 44113
(216) 781-1212

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether anonymous acts of harassment, allegedly taken by local government officials, can constitute acts "under color of" state law within the meaning of 42 U.S.C. § 1983.

2. Whether a federal court has discretion to deny, on the basis of a plaintiff's allegations, an individual capacity defendant's motion for summary judgment invoking federal qualified immunity where the plaintiff's claim is not supported by significantly probative evidence.

3. Whether, in an interlocutory appeal from a denial of a motion for summary judgment based on federal qualified immunity, the Court of Appeals may remand to the District Court the pretrial determination of whether individual public officials sued in their individual capacities are entitled to summary judgment on the basis of qualified immunity.

LIST OF PARTIES

All parties in the Sixth Circuit Court of Appeals proceeding are listed in the caption.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

REPORTS OF OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT 8

I. ANONYMOUS ACTS DO NOT SATISFY THE "UNDER COLOR OF" STATE LAW REQUIREMENT OF 42 U.S.C. § 1983 8

II. A FEDERAL COURT HAS NO DISCRETION TO DENY, ON THE BASIS OF A PLAINTIFF'S ALLEGATIONS, AN INDIVIDUAL CAPACITY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT INVOKING FEDERAL QUALIFIED IMMUNITY, WHERE THE PLAINTIFF'S CLAIM IS NOT SUPPORTED BY SIGNIFICANTLY PROBATIVE EVIDENCE 14

III. IN AN INTERLOCUTORY APPEAL FROM A DENIAL OF A MOTION FOR SUMMARY JUDGMENT BASED ON FEDERAL QUALIFIED IMMUNITY, THE COURT OF APPEALS SHOULD NOT REMAND TO THE DISTRICT COURT THE PRETRIAL DETERMINATION OF WHETHER INDIVIDUAL PUBLIC OFFICIALS SUED IN THEIR INDIVIDUAL CAPACITIES ARE ENTITLED TO SUMMARY JUDGMENT ON THE BASIS OF QUALIFIED IMMUNITY 20

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 744 U.S. 242 (1986) 15, 16

Computer Place v. Hewlett-Packard Co., 607 F.Supp. 822 (N.D. Cal. 1984), *aff'd mem.*, 779 F.2d 56 (9th Cir. 1985) 16

Davis v. Scherer, 468 U.S. 183 (1984) 18

Delacambre v. Delacambre, 635 F.2d 407 (5th Cir. 1981) 12

Elder v. Holloway, 510 U.S. ___, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994) 18

First Nat'l Bank v. Cities Service Co., 391 U.S. 253 (1968) 17, 18

Gleason v. McBride, 715 F. Supp. 59 (S.D.N.Y. 1988), *modified on other grounds*, 869 F.2d 688 (2d Cir. 1989) 9

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 18

Hughes v. Halifax County School Bd., 855 F.2d 183 (4th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1988) 13

Hunter v. Bryant, 502 U.S. ___, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) 18, 19

Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990) 15, 17

Manning v. Jones, 696 F. Supp. 1231 (S.D. Ind. 1988) 10

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 16

Mid-Shiawassee County Concerned Citizens v. Train, 408 F.Supp. 650 (E.D. Mich. 1976), *aff'd mem.*, 559 F.2d 1220 (6th Cir. 1977) 17

TABLE OF AUTHORITIES – Continued

Page

Mitchell v. Forsyth, 472 U.S. 511 (1985) 18

Monell v. Department of Social Servs., 436 U.S. 658 (1978) 9

Monroe v. Pape, 365 U.S. 167 (1961) 9

Morgan v. Tice, 862 F.2d 1495 (11th Cir.), *cert. denied*, 493 U.S. 813 (1989) 10

Murphy v. Chicago Transit Auth., 638 F. Supp. 464 (N.D. Ill. 1986) 12

Paul v. Davis, 424 U.S. 693 (1976) 11

Pitchell v. Callan, 13 F.3d 545 (2d Cir. 1994) 9, 13

Polk County v. Dodson, 454 U.S. 312 (1981) 12

Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, 506 U.S. ___, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993) 18

Screws v. United States, 325 U.S. 91 (1945) 13

United States v. Classic, 313 U.S. 299 (1941) 9

West v. Atkins, 487 U.S. 42 (1988) 9, 10

White v. Hearst Corp., 669 F.2d 14 (1st Cir. 1982) 18

Woodward v. City of Worland, 977 F.2d 1392 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 3038, 125 L.Ed.2d 724 (1993) 12

Wyatt v. Cole, 504 U.S. ___, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992) 18

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTION

Art. I, § 3 3

First Amendment 14

Fourteenth Amendment 2-4

UNITED STATES CODE

28 U.S.C. §1254(1) 1

28 U.S.C. § 1331 3

28 U.S.C. § 1343 3

42 U.S.C. § 1983 ..... *passim*

RULES

Fed. R. Civ. P. 12(b)(6) 15, 17

Fed. R. Civ. P. 56 17

Fed. R. Civ. P. 56(c) 2

Fed. R. Civ. P. 56(e) 2, 17

Fed. R. Evid. 801(d)(2) 6, 8

Petitioners Thomas Longo, David E. Mack, Nancy J. Marincic, Rose Marie Lovano, Joseph Suster, Michael Abella, and Wilhelm G. Spiegelberg, in their individual capacities, hereby petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

REPORTS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (App., *infra*, A-1) is reported at 34 F.3d 359. The memorandum opinion and judgment entry of the United States District Court for the Northern District of Ohio (App., *infra*, A-18), which denied petitioners' qualified immunity motion for summary judgment, is not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on September 1, 1994. The Sixth Circuit denied petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc in an order filed November 3, 1994. (App., *infra*, A-16). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech. . . . "

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law;. . . . "

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

Rule 56(c) of the Federal Rules of Civil Procedure provides, in pertinent part, that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(e) provides, in pertinent part, that "[w]hen a motion for summary judgment is made and supported as provided in this rule, . . . the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

STATEMENT OF THE CASE

Respondent filed this action in the United States District Court for the Northern District of Ohio, Eastern Division. Respondent alleged, *inter alia*, that petitioners violated respondent's rights under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. Jurisdiction was therefore conferred on the District Court by 28 U.S.C. §§ 1331 and 1343.

Petitioner Thomas J. Longo ("Longo") has been at all pertinent times the Mayor of the City of Garfield Heights ("Garfield Heights"). Petitioner David E. Mack ("Mack") has been at all pertinent times the Director of Law of Garfield Heights. Petitioner Wilhelm G. Spiegelberg ("Spiegelberg") was an Assistant Law Director of Garfield Heights. The other petitioners are members of the Garfield Heights City Council ("Council"). Respondent sued petitioners in both their individual and official capacities; the respondent also named Garfield Heights as a defendant.

Petitioners filed a motion for summary judgment on the basis of qualified immunity with regard to the individual capacity claims against them. The District Court denied that motion with respect to three of respondent's federal claims: (1) a claim invoking Article I, § 10 of the Constitution ("No State shall . . . pass any Bill of Attainder") as applied to a resolution and ordinance passed by the Council on November 11, 1991; (2) a First Amendment claim (applied to local governmental action by the Fourteenth Amendment) based upon the November 11, 1991 resolution and ordinance; and (3) a First/

Fourteenth Amendment claim based upon alleged harassment of respondent prior to his leaving office as a Council member on November 10, 1991. In an interlocutory qualified immunity appeal, the Sixth Circuit Court of Appeals reversed the denial of qualified immunity with regard to the first two claims; however, the Sixth Circuit affirmed the denial of qualified immunity with regard to the First Amendment claim predicated upon alleged pre-November 11, 1991 threats or acts of physical violence. Accordingly, the within petition for certiorari involves only the First Amendment claim based upon the alleged pre-November 11, 1991 threats or acts of physical harassment.

Respondent was a member of the Garfield Heights Council from November 13, 1989 to November 10, 1991. Before, during, and after respondent's term on the Council, various people inside and outside the government of Garfield Heights questioned whether respondent had met the residency requirement of the Garfield Heights Charter applicable to members of Council. On November 11, 1991 – the day after respondent left office – the newly constituted Council adopted Resolution No. 54-1991, which provided, in pertinent part, as follows:

> The Mayor and this Council, on behalf of the residents of the City of Garfield Heights, join together to express their disapproval and outrage over the intentional disregard of Section 9 [residency requirement] of the Charter of the City of Garfield Heights by former Councilman George Zilich during his tenure as Councilman, and demand that he return all compensation given to him in renumeration [*sic*] for his service

> as Councilman because of his being in violation of this provision of the City Charter.

At the same November 11, 1991 meeting, the Council also passed Ordinance No. 112-1991, which provided, in pertinent part, as follows:

> The Law Director . . . is hereby authorized and directed to take whatever legal action is necessary to collect from former Councilman Zilich the salary he received during his term as Councilman because of former Councilman Zilich's intentional disregard and violation of Section 9 [residency requirement] of the Charter of the City of Garfield Heights.

The title of the this ordinance read, in pertinent part: "AN ORDINANCE AUTHORIZING AND DIRECTING THE DIRECTOR OF LAW TO TAKE WHATEVER ACTION IS NECESSARY, LEGAL OR OTHERWISE, TO COLLECT THE SALARY RECEIVED BY FORMER COUNCILMAN GEORGE ZILICH. . . . "

As observed above, the Sixth Circuit Court of Appeals reversed the denial of petitioners' motion for summary judgment with regard to respondent's claims based on the foregoing October 11, 1991 resolution and ordinance. However, the Sixth Circuit affirmed the denial of summary judgment with respect to respondent's First Amendment claim predicated on alleged threats or acts of physical violence against respondent during the timeframe before the passage of the above-quoted resolution and ordinance and during the time respondent was a Council member. As explained below, respondent has no significantly probative evidence linking any of the petitioners to any act of physical violence.

Respondent testified in his deposition that at the end of March 1990, after Council had voted down the Mayor's budget, respondent scheduled a special meeting of the Council Finance Committee for a particular evening. Earlier on the day of the meeting, someone called respondent and stated over the telephone: "You're a dead man, asshole. I'll see you tonight." Respondent does not know the identity of the caller. The Finance Committee meeting was, in respondent's words, "filled with City employees. Virtually everybody there was a City employee. They were there under the pretence that I was out to eliminate their jobs, and they were ready to kill me." However, nobody ever physically attacked respondent.

Respondent also testified that his wife received threatening and menacing telephone calls when he was out of town. However, respondent's wife did not testify, and this testimony is therefore inadmissible hearsay.

Respondent testified further that periodically during 1990 his home was vandalized, that in November 1990 his car windows were shot out, and that his car tires were slashed. He said that when he filed a police report regarding the car window incident, an unidentified police officer said these types of things would stop if respondent would merely stop the criticisms and allegations against the Mayor and the Law Department. Respondent's testimony regarding the alleged statement by the police officer – which does not meet the requirements of Fed. R. Evid. 801(d)(2) – constitutes inadmissible hearsay. Moreover, the alleged statement of the police officer is, in the absence of an evidentiary foundation establishing otherwise, inherently unreliable as being inadmissible speculation or gossip. The only possible evidentiary

foundation that would make the statement admissible would be testimony based on personal knowledge that the police officer was directed or authorized by one or more of the petitioners to make this statement to respondent. No such evidence exists.

Respondent also testified that he had alienated landfill operators and trash haulers and that he was warned by several people to back off because he was dealing with the wrong people when he got involved with landfill operators and trash haulers. However, no such persons have been sued by respondent.

The foregoing summarizes respondent's testimony regarding evidence of alleged threats or acts of physical violence against respondent. No evidence exists that the harassers somehow revealed their supposed connection with the government of Garfield Heights. The legal significance of the anonymous nature of the alleged harassment will be discussed below in the argument regarding the "under color of" state law requirement of 42 U.S.C. § 1983.

Respondent also relies on the deposition of Thomas Furth ("Furth"), a former Assistant Law Director of Garfield Heights. Furth testified as to meetings with petitioners Longo, Mack, and/or Spiegelberg in which such scenarios as raping respondent's wife, cutting respondent (a reputed hemophiliac) with a knife, breaking respondent's legs, and otherwise physically injuring respondent were allegedly discussed. However, it is undisputed that no such acts of physical violence against respondent or his wife ever occurred, and no evidence exists that any of

the petitioners ever threatened respondent with any such acts of physical violence.

ARGUMENT

I. ANONYMOUS ACTS DO NOT SATISFY THE "UNDER COLOR OF" STATE LAW REQUIREMENT OF 42 U.S.C. § 1983.

As observed above, the threats or acts of physical harassment which find any evidentiary support in the record of this case were anonymous in nature. The person or persons who committed the telephone harassment against respondent did not identify themselves. Similarly, the person or persons who caused damage to respondent's automobile and house did not identify themselves and were not, in fact, observed by respondent. Moreover, no petitioner (or person authorized to speak on behalf of any petitioner, Fed. R. Evid. 801(d)(2)) ever told respondent that any petitioner committed any of these acts or caused any of these acts to be committed. The question thus arises whether such anonymous acts can rise to the status of acts taken "under color of" state law within the meaning of 42 U.S.C. § 1983. Although both the District Court and the Sixth Circuit Court of Appeals held in this case that such anonymous acts can constitute action "under color of" state law, that Sixth Circuit view is in conflict with the position taken by several other circuits as to this legal issue. The Sixth Circuit analysis is also inconsistent with the "under color of" state law principles established by this Court.

Anonymous acts cannot be taken "under color of" state law, as required by 42 U.S.C. § 1983, since they are not committed by persons "who carry a badge of authority of a state and represent it in some capacity. . . . " *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled in part on other grounds, Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). An anonymous actor carries no badge at all, let alone the badge of one who is exercising "power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

Applying the aforesaid principles, the Second Circuit has held that a police officer is acting under color of state law only when the officer is acting in accordance with a police regulation or when the officer *"invokes the real or apparent power of the police department." Pitchell v. Callan*, 13 F.3d 545, 548 (2d Cir. 1994) (emphasis added). A fact situation similar to that alleged in the case at bar was considered in *Gleason v. McBride*, 715 F. Supp. 59 (S.D.N.Y. 1988), *modified on other grounds*, 869 F.2d 688 (2d Cir. 1989). In *Gleason*, a mayor and police chief were alleged to have anonymously sent critical letters about a political rival to the rival's employer, thereby causing the rival's termination. The court held: "Assuming for purposes of this motion that [the mayor and police chief] were responsible for the anonymous letters, *the fact they were sent anonymously precludes a finding that they were acting under color of state law* at the time they sent the letters." *Gleason*, 715 F. Supp. at 65 (emphasis added).

The Eleventh Circuit has held that a town manager who investigated the background of and allegedly

defamed a political rival did not act "under color of" state law within the meaning of § 1983 because "[t]here is nothing . . . in the record to indicate that [the town manager] was clothed with the power by the Town . . . to make the alleged defamatory statements. . . . His authority, as Town manager, if any, had no effect on what he had to say. . . . " *Morgan v. Tice*, 862 F.2d 1495, 1499 (11th Cir.), *cert. denied*, 493 U.S. 813 (1989).

The United States District Court for the Southern District of Indiana has held that off-duty police officers who do not identify themselves as police officers, who are not in uniform, do not display badges, and do not arrest anyone, cannot be sued under § 1983 for injuries received during a fight because they were not acting under color of state law. *Manning v. Jones*, 696 F. Supp. 1231, 1234-1235 (S.D. Ind. 1988). The police officers in *Manning* never identified themselves as police officers and did not attempt to do the sort of things police officers, as distinguished from members of the general population, are permitted to do by virtue of their public power, such as detain and question a witness or arrest someone.

> *At no time during the incident was the plaintiff aware that the defendants were police officers. . . .*
>
> Rather, the evidence shows that in all respects the defendants acted as private citizens, *never invoking the power of their state office nor their police persona.* The defendants *did not act "clothed with the authority of state law [or] exercising responsibilities pursuant to state law."*

Manning, 696 F. Supp. at 1235 (emphasis added) (quoting *West v. Atkins, supra*).

Applying the same analysis to respondent's claim, whoever vandalized respondent's property or made the anonymous telephone calls made no attempt to exercise some power or authority possessed as a result of his or her public position. Rather, the actions would appear to respondent to be those of an ordinary private citizen. Accordingly, the actions are not "under color of" state law.

This result is not unnecessarily harsh, as it might seem at first blush. If respondent can prove that the petitioners are responsible for anonymous threats and vandalism, he should invoke state tort law, not federal constitutional law.[1] The United States Constitution should not be used to create "a font of tort law to be superimposed upon whatever systems may already be administered by the states." *Paul v. Davis*, 424 U.S. 693, 701 (1976). Respondent cannot rely on federal constitutional provisions to seek damages for what could only have appeared to respondent to be private and anonymous acts carrying no imprimatur of government approval.

Petitioners briefed the "under color of" state law issue in both the District Court and the Sixth Circuit Court of Appeals. Without directly addressing the merits of the petitioners' argument, the Sixth Circuit opinion stated:

> Here, it is alleged that the mayor and other city officials – on city time and in city offices –

---

[1] In making this statement, petitioners do not waive any defense or immunity afforded by state law with regard to state claims.

> plotted to injure plaintiff for his political views. In light of the resolution and ordinance demonstrating hostility toward plaintiff, these allegations, if proved, are sufficient to support a conclusion that defendants were acting under color of official right.

(App., *infra*, A-14).

Petitioners disagree with the analysis in this passage for several reasons. First, the passage suggests that an act may be considered to have been taken "under color of" state law because the act occurs on city time or in city offices. Even if an alleged offender is on city time and on city premises, the actions taken are not necessarily under color of state law. For example, the Fifth Circuit has held that a police chief's altercation with his sister-in-law at a police station while on duty "arose out of an argument over family *and political* matters" and did not involve action taken under color of law within the meaning of § 1983. *Delacambre v. Delacambre*, 635 F.2d 407, 408 (5th Cir. 1981) (emphasis added); *accord Woodward v. City of Worland*, 977 F.2d 1392, 1401 (10th Cir. 1992) ("The mere fact that all the participants were state employees or that the offending acts occurred during working hours is not enough" to constitute action taken "under color of" state law), *cert. denied*, 113 S.Ct. 3038, 125 L.Ed.2d 724 (1993); *Murphy v. Chicago Transit Auth.*, 638 F. Supp. 464, 467-68 (N.D. Ill. 1986) (interpreting *Polk County v. Dodson*, 454 U.S. 312 (1981)). Second, the Sixth Circuit's analysis relies on the existence of an ordinance passed *months later* to demonstrate that prior actions were taken under color of "official right." Third, the purported plots to harm

respondent allegedly involved the Mayor, the Law Director, and the Assistant Law Director. However, the ordinance was introduced and passed by members of the Garfield Heights Council, *none of whom was ever connected with or even knew about the alleged plots.* Thus, the Sixth Circuit has used the "hostility toward plaintiff" expressed by one group of people to demonstrate that unknown acts of an entirely different group of people were taken under color of state law.

As the Second Circuit has observed, "it is by now axiomatic that 'under "color" of law means under "pretense" of law'. . . . " *Pitchell*, 13 F.3d at 547-48 (quoting *Screws v. United States*, 325 U.S. 91, 111 (1945)). Following the principles set forth above, the Fourth Circuit has observed that the cases that have found the "under color of" state law requirement to be met have involved fact situations in which "the actions complained of were committed while the defendants were *purporting* to act under the authority vested in them by the state, or were otherwise *made possible because of the privileges of their employment.*" *Hughes v. Halifax County School Bd.*, 855 F.2d 183, 186-87 (4th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1988). The Fourth Circuit held that even though the plaintiff in that case "was accosted by county employees with retaliation in their eyes, on county land, with a county-owned rope, during work hours", with a motive to retaliate against the plaintiff for his testimony in a grand jury investigation of their governmental employer, the acts of the defendants did not meet the "under color of" state law requirement because the defendants were not purporting to act under the authority vested in them by the state and their acts were not otherwise made possible

because of the privileges of their employment. 855 F.2d at 186-87.

A fortiori, the anonymous acts (telephone harassment and damage to respondent's car and house) of which there is any evidence in this case do not satisfy the "under color of" state law requirement of 42 U.S.C. § 1983. As demonstrated above, the Sixth Circuit holding in this case is in conflict with the principles recognized by the Second, Fourth, Fifth, Tenth, and Eleventh Circuits. Moreover, that Sixth Circuit holding is inconsistent with this Court's decisions on the "under color of" state law requirement. Petitioners therefore submit that this question is of sufficient importance to merit the review of this Court.

II. A FEDERAL COURT HAS NO DISCRETION TO DENY, ON THE BASIS OF A PLAINTIFF'S ALLEGATIONS, AN INDIVIDUAL CAPACITY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT INVOKING FEDERAL QUALIFIED IMMUNITY, WHERE THE PLAINTIFF'S CLAIM IS NOT SUPPORTED BY SIGNIFICANTLY PROBATIVE EVIDENCE.

In the present case, the Sixth Circuit held, in a published decision, that *"[i]f proven . . .* the other *allegations* of harassment clearly would violate the First Amendment." (App., *infra,* A-6 (emphasis added)). The Sixth Circuit opinion also stated: *"Only a trial will permit [respondent] the full opportunity to prove defendants' involvement* in the actions taken against him." (App., *infra,* A-14 (emphasis added)). As observed in the preceding section of this petition, the Sixth Circuit also held that the respondent's

"allegations, if proved, are sufficient to support a conclusion that defendants were acting under color of official right." (App., *infra,* A-14 (emphasis added)).

From the above-quoted language of the Sixth Circuit, the reader might draw the conclusion that the published Sixth Circuit decision was addressing the propriety of a motion to dismiss under Fed. R. Civ. P. 12(b)(6). However, the Sixth Circuit had before it a record on appeal consisting of more than 1,000 pages of depositions and affidavits, and petitioners' appeal to the Sixth Circuit was from a denial by the District Court of petitioners' motion for summary judgment on the basis of qualified immunity.

The published Sixth Circuit opinion was based on the implicit – if not explicit – premise that mere allegations by a plaintiff are sufficient to withstand a motion for summary judgment on the basis of qualified immunity. Indeed, as indicated in the Statement of the Case, *supra,* the evidence of record is insufficient to support respondent's remaining claim.

The Sixth Circuit approach to summary judgment and qualified immunity in this case is in conflict with well-established Supreme Court authority. This Court has held that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is *merely colorable,* or is *not significantly probative,* summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.,* 744 U.S. 242, 249-50 (1986) (emphasis added) (citations omitted); *accord Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 888 (1990). "[S]ummary judgment should be granted

where the evidence is such that it 'would require a directed verdict for the moving party.' " *Liberty Lobby*, 744 U.S. at 251. "In essence . . . the inquiry [for both summary judgment and directed verdict] is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52. "*The mere existence of a scintilla of evidence in support of the plaintiff's position is insufficient*; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252 (emphasis added). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita*, 475 U.S. at 587.

The Sixth Circuit opinion in the present case specifically rested its holding on the *coincidence* between conversations at certain informal meetings "in which the mayor and others discussed threatening [respondent], slapping him around, breaking his legs, 'cutting him' and intimidating him" and "the vandalism and harassing telephone calls that [respondent] and his wife experienced." (App., *infra*, A-13, A-14 (emphasis added)). However, "[s]peculation based on coincidence is insufficient to raise a material issue of fact." *Computer Place v. Hewlett-Packard Co.*, 607 F.Supp. 822, 830 (N.D. Cal. 1984), *aff'd mem.*, 779 F.2d 56 (9th Cir. 1985). "Suspicion is not the stuff of which

opposition to summary judgment is made." *Mid-Shiawassee County Concerned Citizens v. Train*, 408 F.Supp. 650, 657 (E.D. Mich. 1976), *aff'd mem.*, 559 F.2d 1220 (6th Cir. 1977).

Moreover, "conclusory allegations of an affidavit" do not constitute significantly probative evidence sufficient to withstand a properly supported motion for summary judgment. *National Wildlife Fed'n*, 497 U.S. at 888. Unlike a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a motion for summary judgment under Fed. R. Civ. P. 56 can be defeated only by evidentiary materials setting forth specific facts. *National Wildlife Fed'n*, 497 U.S. at 888-89. "It will not do to 'presume' the missing facts because without them the affidavits would not establish the injury that they generally allege." *Id.* at 889. Ambiguities in the nonmovants' own evidentiary material must be resolved in favor of the movant. *Id.* at 886. Indeed, "Rule 56(e) provides that judgment 'shall be entered' against the nonmoving party unless affidavits or other evidence 'set forth specific facts showing that there is a genuine issue for trial.' " *Id.* The affidavits and depositions upon which respondent relies are replete with just the type of conclusory, vague, ambiguous, and speculative testimony that this Court rejected in *National Wildlife Federation, supra; accord First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 277-90 (1968).

The Sixth Circuit's opinion in the instant case concludes, on the basis of such speculative evidence, that "[o]nly a trial will permit [respondent] the full opportunity to prove [petitioners'] involvement in the actions taken against him." (App., *infra*, A-14). This approach to summary judgment is directly contrary to the Supreme

Court's admonition that summary judgment cannot be defeated by "the hope that something can be developed at trial in the way of evidence to support [the respondent's] allegations." *Cities Service*, 391 U.S. at 290; *accord White v. Hearst Corp.*, 669 F.2d 14, 20 (1st Cir. 1982).

The foregoing federal summary judgment principles are especially important in the context of a motion for summary judgment on the basis of qualified immunity. "The doctrine of qualified immunity shields public officials . . . from damages unless their conduct was unreasonable in light of clearly established law." *Elder v. Holloway*, 510 U.S. ___, 114 S.Ct. 1019, 1021, 127 L.Ed.2d 344, 349 (1994); *accord Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). More specifically, "*[a] plaintiff* who seeks damages for violation of *constitutional* or statutory rights may overcome the defendant official's qualified immunity only by *showing* that *those rights* were *clearly established at the time of the conduct at issue*." *Davis v. Scherer*, 468 U.S. 183, 197 (1984) (emphasis added).

This Court "repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. ___, 112 S.Ct. 534, 536, 116 L.Ed.2d 589 (1991). Special procedural and evidentiary rules are dictated by the nature of qualified immunity: "The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in original); *accord Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. ___, 113 S.Ct. 684, 687, 121 L.Ed.2d 605 (1993); *Wyatt v. Cole*, 504 U.S. ___, 112 S.Ct. 1827, 1832, 118 L.Ed.2d 504 (1992). The

importance of early resolution of the qualified immunity issue mandates that courts reviewing summary judgment motions in a qualified immunity context be particularly critical of the nonmoving party's proffered evidence in order to determine whether such evidence does indeed meet the principles expressed in the above-cited cases. *Hunter*, 112 S.Ct. at 536-37. Whatever may be the case with regard to motions for summary judgment outside the context of qualified immunity, a court has no discretion, when considering a motion for summary judgment based upon qualified immunity, to subject an individual capacity defendant to trial when the evidence produced during the discovery process establishes that no *genuine* issues of *material* fact exist. *Hunter*, 112 S.Ct. at 536-37.

Because the Sixth Circuit Court of Appeals applied summary judgment and qualified immunity standards that are in conflict with the summary judgment and qualified immunity principles established by the Supreme Court and applied by other circuits, this Court should review the published decision of the Sixth Circuit in this case.

III. IN AN INTERLOCUTORY APPEAL FROM A DENIAL OF A MOTION FOR SUMMARY JUDGMENT BASED ON FEDERAL QUALIFIED IMMUNITY, THE COURT OF APPEALS SHOULD NOT REMAND TO THE DISTRICT COURT THE PRETRIAL DETERMINATION OF WHETHER INDIVIDUAL PUBLIC OFFICIALS SUED IN THEIR INDIVIDUAL CAPACITIES ARE ENTITLED TO SUMMARY JUDGMENT ON THE BASIS OF QUALIFIED IMMUNITY.

In deciding to permit respondent's First Amendment claim to proceed based on anonymous threats and vandalism, the Sixth Circuit decision noted that "those defendants who are not alleged to have taken any actions to harass plaintiff are entitled to dismissal." (App., *infra*, A-15 n.4). The Sixth Circuit then stated that "[o]n remand, the district court should determine which defendants should remain in the case on this claim." *Id.* At the outset, since this appeal is from the denial of a summary judgment motion, the reference to what plaintiff "alleged" is unwarranted. As established in the preceding section of this petition, the proper inquiry is *not* which defendants are *alleged* by Zilich to have harassed him, but rather whether Zilich has *presented significantly probative, admissible evidence* that each of the various defendants has harassed him. The remand of such determination to the District Court is inappropriate, especially in a qualified immunity context. The Sixth Circuit had before it an extensive evidentiary record created during the discovery process. The Sixth Circuit should have made a fact-specific qualified immunity determination with regard to each individual capacity defendant. To remand the matter to the District Court for such determination would only

result in further delay, creating the possibility that the District Court's determination that certain defendants were not entitled to qualified immunity would be subject to an additional interlocutory appeal. Review by this Court is warranted in order to establish the proper qualified immunity procedure in this context.

CONCLUSION

As explained above, this case presents significant questions for the Supreme Court's consideration. The Sixth Circuit's published opinion in this case is in serious and substantial conflict with both the prior decisions of this Court and the published decisions of other circuits. Therefore, petitioners request that the Court issue a writ of certiorari to the Sixth Circuit Court of Appeals to review its judgment in the instant case.

Respectfully submitted,

ALAN E. JOHNSON
Counsel of Record
LEO R. WARD
WARD & ASSOCIATES, A Legal Professional Association
1265 West 6th St., 4th Floor
Cleveland, Ohio 44113
(216) 241-0515

MARCIA E. HURT
FREDERICK W. WHATLEY
R. TODD HUNT
WALTER, HAVERFIELD, BUESCHER & CHOCKLEY
1215 Terminal Tower
Cleveland, Ohio 44113
(216) 781-1212

Attorneys for Petitioners

34 F.3d 359

George ZILICH, Plaintiff-Appellee,

v.

Thomas LONGO; David Mack; Nancy Marincic; Rose Marie Lovano; Joseph Suster; Michael Abella; And Wilhelm Spiegelberg, Defendants-Appellants.

No. 93-3511.

United States Court of Appeals,
Sixth Circuit.

Argued April 25, 1994.

Decided Sept. 1, 1994.

Rehearing and rehearing
en banc denied November 3, 1994

Former city council [sic] sued mayor and other city officials alleging, inter alia, a bill of attainder claim and two First Amendment claims based on actions allegedly in retaliation for plaintiff's political opposition to the mayor. Defendants' motion for summary judgment based on qualified immunity was denied by the United States District Court for the Northern District of Ohio, David D. Dowd, Jr., J., and defendants appealed. The Court of Appeals, Merritt, Chief Judge, held that: (1) neither city council resolution denouncing plaintiff and demanding return of compensation because of alleged violation of residency requirement, nor ordinance authorizing law director to go to court to recover amounts alleged to have been illegally received by plaintiff, constituted bill of attainder; (2) resolution and ordinance did not violate First Amendment even if passed in retaliation for plaintiff's expression of hostility toward mayor and criticisms of mayor's conduct; but (3) defendants were not entitled

to qualified immunity with respect to claim that they retaliated against plaintiff with physical threats, harassment and vandalism.

Affirmed in part, reversed in part, and remanded.

J. Michael Murray, Berkman, Gordon, Murray, Palda & DeVan, Cleveland, OH, Patrick M. Flanagan, Savoy, Bilancini, Flanagan & Kenneally (argued and briefed), Elyria, OH, for George Zilich.

Frederick W. Whatley (argued), R. Todd Hunt, Walter, Haverfield, Buescher & Chockley, Cleveland, OH, for City of Garfield Hts, et al.

Marcia E. Hurt, Walter, Haverfield, Buescher & Chockley (briefed), Alan E. Johnson, Leo R. Ward, Smith R. Brittingham, IV (briefed), Ward & Associates, Cleveland, OH, for Thomas J. Longo, David E. Mack, Nancy J. Marincic, Rose Marie Lovano, Joseph Suster, Michael Abella and Wilhelm G. Spiegelberg.

Before: MERRITTT, Chief Judge; and MILBURN and SILER, Circuit Judges.

MERRITT, Chief Judge.

The defendants, the mayor of a small Ohio town and other local officials, passed a city council resolution denouncing plaintiff, a former city council member, allegedly in retaliation for his political opposition to the mayor. The plaintiff also alleges threats of physical harm by defendants. Plaintiff filed suit under 42 U.S.C. § 1983 making numerous claims, three of which – a bill of attainder claim and two types of First Amendment claims

– are the subject of this interlocutory appeal. The district court denied defendants' summary judgment motion based on qualified immunity from liability on the claims. It held that there was a material dispute of fact on these three issues. To determine whether defendants are entitled to qualified immunity, we must decide as a preliminary matter if the resolution and ordinance in question could constitute (1) a bill of attainder or (2) a violation of plaintiff's First Amendment rights and (3) whether alleged threats of physical violence against plaintiff in retaliation for his political criticism could constitute a violation of his right of free speech by defendants under color of law.

I. Facts

The plaintiff, George Zilich, was formerly a member of the city council in Garfield Heights, Ohio. The defendants in this appeal are Thomas Longo, the mayor of Garfield Heights; David Mack and Wilhelm Spiegelberg, the law director and assistant law director; and Nancy Marincic, Rose Marie Lovano, Michael Abella and Joseph Suster, members of the city council who voted for the resolution and ordinance challenged by plaintiff.

After Zilich's election in 1989, the defeated incumbent claimed that Zilich failed to meet the city's three-year residency requirement to be a member of the council and filed suit to enjoin Zilich from taking office. The state court refused to enter an injunction on various grounds, one of which was that the city council is the sole judge of the qualifications of its own members. After taking office,

several individuals attempted to challenge Zilich's qualifications before the council but the council refused to disqualify him.[1]

During his two-year term, Zilich was a thorn in the side of the mayor and his administration. He challenged the city's fiscal policies, its contract bidding procedures and the actions of the police and law departments, among other issues.

For purposes of this appeal, we assume the existence of the following facts:

During this same period, Zilich's home was vandalized, his tires were slashed, his car windows were shot out and he and his wife received anonymous phone calls threatening bodily harm. For example, just before a meeting on the mayor's budget proposal, an anonymous caller threatened "see you tonight asshole, you're a dead man." Around this same time, Thomas Furth, an assistant law director for the city, told Zilich about the mayor's increasing hostility toward him. In addition, a policeman investigating the shooting of Zilich's car told him that "these

---

[1] The residency question as to Zilich is unclear but is not a matter that need concern us. He grew up in Garfield Heights and lived there on and off for thirty years. In 1986, however, he was living and registered to vote in another suburb of Cleveland. He purchased a home in Garfield Heights in June 1987, two and half years before the 1989 election. *After* he moved, the city changed the residency requirement from one to three years. Thus, there remain questions as to whether Zilich met the requirement because he had lived there previously with the intent to establish residency, and secondly, whether he was "grandfathered" in because he established his residence prior to the change in requirements.

type things would stop if he would merely stop his criticisms and allegations against the mayor and the law department."

Furth actually attended meetings in which the mayor and others discussed silencing Zilich and provided detailed testimony about the serious nature of these threats. According to Furth, the mayor and his staff discussed slapping Zilich around, shooting him, hiring someone to break his legs, "cutting him" because he was a "bleeder" and tearing his throat out. These threats also involved terrorizing Zilich's family, and one specific plan included sexually assaulting Mrs. Zilich. The defendants maintain that all of these threats were "jokes," but Furth testified that none were made in a joking manner.

In 1991 Zilich did not run for reelection. On its first night of business, the new city council passed a resolution and ordinance[2] stating that Zilich had violated the

---

[2] Resolution 54-1991 stated:

A Resolution expressing the disapproval and outrage of the Council of the City of Garfield Heights in regard to the intentional disregard of Section 9 of the Charter of the City of Garfield Heights by former councilman George Zilich and demanding that he return all compensation received during his tenure as councilman because of his intentional violation of the charter provisions of this city. . . .

SECTION 1. The Mayor and this Council, on behalf of the residents of the City of Garfield Heights, join together to express their disapproval and outrage over the intentional disregard of Section 9 of the Charter of the City of Garfield Heights by former councilman George Zilich during his tenure as Councilman, and demand that he return all compensation

city charter's residency requirement and that he had never been qualified to hold office. The ordinance also authorized the law director to collect the salary paid to Zilich during his tenure. Zilich maintains that the resolution was part of the ongoing conspiracy to harass and intimidate him, and was meant to threaten him and to ruin his political career.

The district court viewed these events as related, inferring that the evidence supported a common conspiracy to ruin plaintiff's reputation and political future. It held that the resolution and ordinance constituted a bill of attainder and that their passage was in retaliation for plaintiff's exercise of his First Amendment rights. We conclude that the resolution and ordinance are not a bill of attainder and that their passage did not violate plaintiff's clearly established First Amendment rights; therefore, defendants are entitled to qualified immunity on these claims. If proven, however, the other allegations of harassment clearly would violate the First Amendment.

---

given to him in renumeration (sic) for his service as Councilman because of his being in violation of this provision of the City Charter.

Ordinance 112-1991 provided:

> An ordinance authorizing and directing the Director of Law to take whatever action is necessary, legal or otherwise, to collect the salary received by former Councilman George Zilich during his previous two year term as Councilman at which time he was intentionally violating Section 9 of the Charter of the City of Garfield Heights.

II. Bill of Attainder Claim

[1, 2] Zilich argues that the resolution and ordinance passed by the city council constitute a bill of attainder adopted in violation of Article I § 10 of the Constitution ("No State shall . . . pass any Bill of Attainder"). A bill of attainder is a "law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 846-47, 104 S.Ct. 3348, 3352, 82 L.Ed.2d 632 (1984) (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 468, 97 S.Ct. 2777, 2802-03, 53 L.Ed.2d 867 (1977)). Thus, there are three essential elements to a bill of attainder: "specifically . . . , punishment, and lack of a judicial trial." *Selective Service*, 468 U.S. at 847, 104 S.Ct. at 3352. Applying these factors, the court below found that "[t]he Resolution and Ordinance in question represents a classic case of a bill of attainder" and noted that "the Ordinance and Resolution was passed without the benefit of a trial, and remains an enforceable piece of legislation." The district court rejected the defendants' qualified immunity defense and held that the council was not judging the qualifications of one of its members, but instead sought "to deprive an individual of his property without the benefit of a trial." In doing so the court held that "the defendants' purpose in passing the legislation was punitive in nature."

We believe the district court misunderstands the situation for several reasons. First, the city council merely passed an ordinance authorizing the law director to go to court in order to recover amounts it considers illegally received by the plaintiff. The ordinance does not purport

to confiscate or take title to any of Zilich's property. Whether the city actually recovers will depend entirely on a court judgment, not on a legislative usurpation of the judicial power to adjudicate an individual dispute. Because the ordinance simply authorizes the law director to seek collection of plaintiff's salary, "no feature of the challenged Act falls within the historical meaning of legislative punishment." *Nixon,* 433 U.S. at 475, 97 S.Ct. at 2806.

[3] Second, § 11 of the Garfield Heights City Charter says that the "Council shall be the judge of the election and qualifications of its members." This same power is also given to non-charter municipalities by a state statute which provides that "the legislative authority of a municipal corporation shall be the judge of the election and qualifications of its own members." Ohio Rev.Code § 731.44. Both the charter and the state constitution reflect the well-settled principle that a legislature traditionally has the power to judge the so-called "standing" qualifications (age, residency, citizenship) of its membership. *See generally Powell v. McCormack,* 395 U.S. 486, 518-549, 89 S.Ct. 1944, 1962-1979, 23 L.Ed.2d 491 (1969); *Hitt v. Tressler,* 4 Ohio St.3d 174, 447 N.Ed.2d 1299, 1302 (1983).

Plaintiff has not cited, and our research has not disclosed, a single case in which a court has held that judging a member's qualifications constitutes a bill of attainder. The Bill of Attainder Clause is a "safeguard against legislative exercise of the judicial function, or more simply – trial by legislature." *Song v. Elyria,* 985 F.2d 840, 844 (6th Cir.1993) (citation omitted). The "section proscribing bills of attainder . . . establishes that there are certain types of decision that are . . . inappropriate for

legislative resolution. . . . [T]he bill of attainder clause should be viewed . . . as necessary to the effective separation of powers." Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 Yale L.J. 330, 343 (1962) (emphasis in original). The legislative act of judging one's own members cannot be deemed a matter inappropriate for legislative resolution when the city charter specifically grants the council this power. Where the role is traditionally a legislative function, not a judicial function, the Bill of Attainder Clause does not outlaw legislative action against a specific legislator. Legislative bodies may censure, suspend or otherwise discipline a member. They have done so under English and American law for centuries. *Powell*, 395 U.S. at 522-38, 89 S.Ct. at 1964-73 (discussing the impact of English precedent on the Framers' adoption of standing qualifications and the authority of Congress to expel members). The absence of a trial here is not problematic or even surprising because judging a member's qualifications is a legislative function, not a judicial one.

Finally, the fact that the city council's action came after the plaintiff was no longer a member does not matter. A state court may decide that the city council exceeded its power under state law precisely because plaintiff was a former member. This is a matter more properly to be determined under state law. The city council may authorize its city attorney to initiate a lawsuit against a former member of that body. It is not a proper role for federal courts to determine these local political matters under the Bill of Attainder Clause.

III. First Amendment Claim

[4, 5] Plaintiff argues that the resolution and ordinance in question were passed in retaliation for his expressions of hostility toward the mayor and his criticisms of the mayor's conduct and that such a pattern of retaliatory voting and official legislative action violates the Free Speech Clause. As we have previously said, legislative bodies are entitled to judge and express their opinions concerning the qualifications of members based on residency, and they have the power to authorize the law director to sue on behalf of the city. A legislative body does not violate the First Amendment when some members cast their votes in opposition to other members out of political spite or for partisan, political or ideological reasons. Legislators across the country cast their votes every day for or against the position of another legislator because of what other members say on or off the floor or because of what newspapers, television commentators, polls, letter writers and members of the general public say. We may not invalidate such legislative action based on the allegedly improper motives of legislators.

Congress frequently conducts committee investigators and adopts resolutions condemning or approving of the conduct of elected and appointed officials, groups, corporations and individuals. Members often vote to do so, at least in part, because of what the target of their investigation or resolution has said or for purely partisan and ideological reasons. The First Amendment is not an instrument deigned to outlaw partisan voting or petty political bickering through the adoption of legislative resolutions. *See generally Bond v. Floyd*, 385 U.S. 116, 135-36, 87 S.Ct. 339, 349, 17 L.Ed.2d 235 (1966) ("The

manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy"). This principle protects Zilich's right to oppose the mayor without retribution and it also protects defendants' right to oppose Zilich by acting on the residency issue which was left unresolved for over two years.

[6] Voting on legislative resolutions expressing political viewpoints may itself be protected political speech.[3] Such resolutions are simply the expression of political opinion. They do not control the conduct of citizens or create public rights and duties like regular laws. *Little v. North Miami*, 805 F.2d 962, 967 (11th Cir.1986) ("resolution is 'merely declaratory of the will of the corporation in a given matter' and not 'a continuing regulation [or a] permanent rule of government' "). A legislative resolution expressing the political view that flag burning, abortion, lewd films or illegitimacy are morally wrong is not a

---

[3] *Compare Miller v. Hull*, 878 F.2d 523, 532 (1st Cir.) (probably unassailable that elected officials' votes come within the freedom of speech guarantee of the First Amendment), *cert. denied*, 493 U.S. 976, 110 S.Ct. 501, 107 L.Ed.2d 504 (1989) *with Spallone v. United States*, 493 U.S. 265, 302-03 n. 12, 110 S.Ct. 625, 646 n. 12, 107 L.Ed.2d 644 (1990) (dissenting opinion) (four members of Supreme Court rejecting petitioner's claim that voting is "core political speech" and noting that "attempt to recharacterize the common-law legislative immunity doctrine into traditional First Amendment terms is unpersuasive"). The D.C. Circuit also held that a councilmember's vote is speech protected by the First Amendment. *Clarke v. United States*, 886 F.2d 404 (D.C.Cir.1989) (right to vote freely within broad protections of the First Amendment). This opinion, however, was vacated as moot by an *en banc* panel of the D.C. Circuit. *Clarke v. United States*, 915 F.2d 699 (D.C.Cir.1990).

"law . . . abridging the freedom of speech." It is not a law at all in the normal sense of the word.

The legislative body here passed a *resolution* "expressing the disapproval and outrage of the council." It does not have the effect of a "law." The ordinance merely authorizes the law director to file a lawsuit against plaintiff. As noted in the bill of attainder section above, the ordinance contains no punishment or penalty. We therefore do not consider these two hortatory measures to violate plaintiff's First Amendment rights.

[7] This appeal is before us solely on the issue of qualified immunity. Unlike many such cases, however, we do not discuss whether the rights asserted by plaintiff are "clearly established" because even accepting plaintiff's allegations as true we do not believe *any* constitutional violation has occurred. Our "substantive" rejection of plaintiff's claim effectively disposes of the qualified immunity issue. While this type of case is unusual, it is not unprecedented. In *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991), the Supreme Court set forth the appropriate analysis in the qualified immunity context where the court makes the legal determination that plaintiff fails to state a claim:

> A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is "clearly established" at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a

> defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on the merits.

As in *Siegert*, the claim here "failed at an analytically earlier stage of the inquiry into qualified immunity: His allegations, even if accepted as true, did not state a claim for violation of any rights secured to him under the United States Constitution." *Id.* at 227, 111 S.Ct. at 1791. Thus, as to the bill of attainder and First Amendment claims involving the resolution and ordinance, all defendants are entitled to qualified immunity.

IV. First Amendment/Harassment Claim

[8, 9] The alleged threats of physical violence outside the legislative arena by some defendants in response to plaintiff's opposition during his term in office present a different question because "[r]etaliation by public officials against the exercise of First Amendment rights is itself a violation of the First Amendment." *Fraternal Order of Police Hobart Lodge #121, Inc. v. Hobart*, 864 F.2d 551, 553 (7th Cir.1988); *see also Reichert v. Draud*, 701 F.2d 1168, 1170 (6th Cir.1983); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). The district court correctly held that defendants are not entitled to qualified immunity for this misconduct.

[10] As noted above, Zilich's allegations of harassment are supported by the testimony of Thomas Furth, who attended meetings in which the mayor and others discussed threatening Zilich, slapping him around, breaking his legs, "cutting him" and intimidating him. These

threats coincided with the vandalism and harassing telephone calls that plaintiff and his wife experienced. The defendants maintain that the threats were "jokes," but Furth testified that none were made in a joking manner. Only a trial will permit Zilich the full opportunity to prove defendants' involvement in the actions taken against him. The defendants respond that these actions, even if true, were "anonymous" and thus cannot provide the basis for a suit under 42 U.S.C. § 1983. Here, it is alleged that the mayor and other city officials – on city time and in city offices – plotted to injure plaintiff for his political views. In light of the resolution and ordinance demonstrating hostility toward plaintiff, these allegations, if proved, are sufficient to support a conclusion that defendants were acting under color of official right.

We also agree with the findings of the district court that Zilich's First Amendment right of free speech was "clearly esablished" for qualified immunity purposes. The law is well settled in this Circuit that retaliation under color of law for the exercise of First Amendment rights is unconstitutional, and "retaliation claims" have been asserted in various factual scenarios. *Meyers v. City of Cincinnati,* 979 F.2d 1154 (6th Cir.1992) (firemen dismissed); *Boger v. Wayne County,* 950 F.2d 316 (6th Cir.1991) (county employee in Medical Examiner's Office transferred); *Draud,* 701 F.2d at 1170 (change in public school teacher's duties); *Hildebrand v. Board of Trustees,* 662 F.2d 439 (6th Cir.1981) (university professor denied tenure), *cert. denied,* 456 U.S. 910, 102 S.Ct. 1760, 72 L.Ed.2d 168 (1982); *Johnson v. Avery,* 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969) (prisoner retaliated against for seeking access to courts). No reasonable official could possibly

believe that it is constitutionally permissible to retaliate against a political opponent with physical threats, harassment and vandalism. Because officials "of reasonable competence could [not] disagree on this issue, immunity should [not] be recognized." *Mumford v. Zieba*, 4 F.3d 429, 432 (6th Cir.1993).[4]

[11] Thus we conclude that the district court erred in holding that the bill of attainder and First Amendment claims based on the resolution and ordinance should go forward to a trial on the merits. We agree that the First Amendment claim based on threats or acts of physical violence should go to trial. Accordingly we affirm in part and reverse in part and remand the case for further proceedings consistent with this opinion.[5]

---

[4] Because the surviving First Amendment retaliation claim is based on the prior harassment, those defendants who are not alleged to have taken any actions to harass plaintiff are entitled to dismissal. On remand, the district court should determine which defendants should remain in the case on this claim.

[5] The district court also denied summary judgment on Zilich's state law defamation claim involving the passage and publication of the resolution and ordinance. This ruling is a collateral order which is not subject to review. *Marrical v. Detroit News, Inc.*, 805 F.2d 169 (6th Cir.1986). The court in *Marrical* discussed review of state immunity issues, distinguishing between state immunity from suit (which would permit an interlocutory appeal) and immunity from liability (which would not). *Id.* at 173-75. Here, the Ohio immunity statute appears to grant immunity from liability, not suit. Ohio Rev.Code § 2744.03(A) ("immunities may be asserted to establish non-liability"). Accordingly, the Court declines to address this question.

No. 93-3511

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE ZILICH, Plaintiff-Appellant, v. CITY OF GARFIELD HEIGHTS, ET AL., Defendants, THOMAS J. LONGO, ETC., ET AL., Defendants-Appellants.	)	ORDER (Filed Nov. 3, 1994)

BEFORE: MERRITT, Chief Judge; MILBURN and SILER, Circuit Judges.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original hearing panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were

fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk pe

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

George Zilich, Plaintiff, vs. The City of Garfield Heights et al., Defendants.	)	CASE NO. 1:92 CV 188 MEMORANDUM OPINION (Filed Apr. 27, 1993)

I. INTRODUCTION AND PROCEDURAL HISTORY

Plaintiff George Zilich (plaintiff) brings this 42 U.S.C. section 1983 action against the City of Garfield Heights; Garfield Heights City Council members Nancy Marincic, Rose Marie Lovano, Joseph Suster, and Michael Abella; Law Director for the City of Garfield Heights, David Mack; Assistant Law Director, Will Spiegelberg; and Mayor of Garfield Heights, Thomas Longo. Plaintiff, a former Garfield Heights council member, claims that the defendants conspired to ruin his political career through the passage of a resolution and ordinance calling for the forfeiture of plaintiff's salary as councilman because he did not satisfy the residency requirements.

In his initial Complaint filed January 27, 1992, plaintiff claimed that the underpinnings of his § 1983 action were violations of his substantive and procedural due process and equal protection rights.[1]

---

[1] In his first Complaint, plaintiff also brought claims of civil assault, defamation, and RICO violations. The civil assault and

On December 3, 1992, the defendants moved for summary judgment on plaintiff's federal claims, (docket No. 91). Plaintiff filed a response in opposition, (docket No. 113), and the defendants replied, (docket No. 120). Defendants also filed a separate summary judgment motion on plaintiff's state law defamation claim, (docket No. 93). Plaintiff responded to this motion as well, (docket No. 115) and defendants correspondingly filed a reply, (docket No. 118).

On January 12, 1993, the Court *sua sponte* granted the plaintiff leave to file an Amended Complaint containing a First Amendment and bill of attainder claim. On January 26, 1993, defendants moved for summary judgment on plaintiff's newly added claims, (docket No. 134). Plaintiff opposed the motion, (docket No. 136), and defendants filed a reply in support of their motion, (docket No. 138).

Defendants also moved for summary judgment on the basis of qualified immunity, (docket No. 92). Plaintiff has opposed this motion as well, (docket No. 114), and defendants have filed a reply, (docket No. 119).

For the following reasons, the Court grants the defendants' motions for summary judgment on plaintiff's procedural and substantive due process and equal protection claims. Defendants are denied summary judgment on plaintiff's bill of attainder, First Amendment and defamation claims.

RICO claims were dismissed by the Court's June 24, 1992 Order. Plaintiff still maintains his pendent state defamation claim.

II. FACTUAL BACKGROUND

Plaintiff served as a member of city council for the city of Garfield Heights, Ohio from 1988 to 1990. After plaintiff's term had expired, it was alleged by members of the council that plaintiff had not met the residency requirements for service on the city council. On November 11, 1991, the council passed an Ordinance[2] directing the Law Director of the city of Garfield Heights to:

> . . . take whatever action is necessary, *legal* or *otherwise*, to collect the salary received by former councilman George Zilich during his previous two year term as councilman at which time he was intentionally violating Sec. 9 of the charter of Garfield Heights. (emphasis added).

The Ordinance also directed the Law Director to distribute a copy of the Ordinance to the local media. The Ordinance was published in a number of local papers including the Cleveland Plain Dealer.

Plaintiff claims that since the Ordinance was passed, his car windows have been shot out, his tires have been slashed, he has received threatening phone calls, and he has received threats to his person, his family and his property from city employees. Plaintiff claims that these events are a direct result of the defendants' conspiracy to "destroy him politically." Complaint at par. 27.

Defendants have moved for summary judgment on the basis of qualified immunity claiming that plaintiff has not established the violation of a clearly established constitutional right, and that if such a violation has occurred

---

[2] Ordinance No. 112-1991.

the defendants could not have reasonably known at the time of the action that they were violating a clearly established constitutional right. Defendants have also moved for summary judgment on each of plaintiff's claims asserting that there are no genuine issues of material facts, and that all undisputed facts lead to the conclusion that plaintiff's claims must fail.

III. SUMMARY JUDGMENT STANDARD

It is well established that when considering a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, "the inferences to be drawn from the underlying facts contained in [affidavits, pleadings, depositions, answers to interrogatories, and admissions] must be viewed in the light most favorable to the party opposing the motion." *U.S. v. Diebold*, 369 U.S. 654, 655 (1962); *United States v. Hodges X-Ray, Inc.*, 759 F.2d 557 (6th Cir. 1985); *Tee-Pak, Inc. v. St. Regis Paper Co.*, 491 F.2d 1193 (6th Cir. 1974); *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425 (6th Cir. 1962). However, the non-moving party bears the responsibility to demonstrate that summary judgment is inappropriate under Rule 56(e). The "adverse party may not rest upon the mere allegations or denials of [his] pleadings, but [his] response, by affidavits or otherwise . . . , must set forth specific facts showing there is a genuine issue for trial. If [he] does not so respond, summary judgment, if appropriate, shall be entered against [him]." Fed. R. Civ. P. 56(e).

A court may grant summary judgment only if there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R.

Civ. P. 56(c). "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.* (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968)). Therefore, "[i]f the evidence is merely colorable, . . . , or is not significantly probative, summary judgment may be granted." *Id.* at 249-250 (citing *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (*per curiam*); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. at 290). " 'The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.' " *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989) (quoting *Anderson v. Liberty Lobby*, 477 U.S. at 252)). Moreover, summary judgment is appropriate when the nonmoving party "has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

In sum, "[t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250.

IV. DISCUSSION

A. Substantive Due Process.

Plaintiff claims that the defendants violated his substantive due process rights by "willfully enact[ing] legislation which was directed solely against him and which had no substantial relationship to the public health, safety, morals, or welfare." (Plaintiff's brief at 12). Plaintiff asserts that such conduct "can only constitute oppressive government action." *Id.*

Substantive due process bars "certain arbitrary, wrongful government actions regardless of the procedures used to implement them." *Zinermon v. Burch,* 494 U.S. 113, 125 (1989). A violation of an individual's substantive due process rights will lie only where a right "so rooted in the traditions and conscience of our people as to rank as fundamental" has been denied. *Michael H. v. Gerald D.,* 491 U.S. 110, 122 (1989) (plurality opinion), *quoting, Sunder v. Massachusetts,* 291 U.S. 97, 105 (1934), *overruled on other grounds, Duncan v. Louisiana,* 391 U.S. 145 (1968). A plaintiff may invoke §1983 for a substantive due process claim regardless of the availability of state remedies. *Zinermon, supra.*

In his Amended Complaint, plaintiff identifies the substantive due process violations that he suffered at the hands of the defendants as: interference with his right to hold public office; damage to his reputation; threats to his person, his family and his property; and deprivation of his property in the form of the potential back pay. Amended Complaint at par. 59. However, none of these rise to the level of a constitutional deprivation.

Courts have held that there is no constitutional right to hold public office. *Peterson v. Knutson*, 367 F. Supp. 515 (D. Minn. 1973), *aff'd*, 505 F.2d 736 (8th Cir. 1974); *Dupont v. Demper*, 501 F. Supp. 1081 (M.D. La 1980); and *Gruenberg v. Kavanagh*, 413 F. Supp. 1132, 1135 (E.D. Mich. 1976). Similarly, a cause of action under the Fifth Amendment does not lie for damage to one's reputation. *Paul v. Davis*, 424 U.S. 693 (1976). The *Paul* Court held:

> The words "liberty" and "property" as used in the Fourteenth Amendment do not single out reputation as a candidate for special protection over and above other interests that may be protected by state law.

Id. at 701.

Zilich also alleges that the defendants have deprived him of his right to freedom from threats to his person, his family and his property. Mere threats, as opposed to actual deprivations of rights, are not actionable. *Macko v. Byron*, 576 F. Supp. 875, 880 (N.D. Ohio 1983), *aff'd*, 760 F.2d 95 (6th Cir. 1985).

Finally, as to the deprivation of his property, namely his back pay, plaintiff's claim is not ripe as such a deprivation has yet to occur. As of the date of this Opinion, plaintiff is still in possession of the salary he was paid during his term as a councilmember. *Macko, supra* at 880. Finding that plaintiff cannot advance a clearly established constitutional right, the Court grants the defendants' motion for summary judgment on plaintiff's substantive due process claim.

B. Procedural Due Process.

Unlike substantive due process, in a procedural due process claim the "deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law.*" (emphasis in original), *Zinermon, supra* at 125, *quoting, Parratt v. Taylor,* 451 U.S. 517, 537 (1981).

"A basic principle of due process under the Fourteenth Amendment is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.' " *Cherin v. Welchans,* 844 F.2d 322 (6th Cir. 1988), *quoting, Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950). The notice must be such that it is reasonably calculated to "appraise interested parties of the pendency of the [governmental] action." *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1 (1977). Further, the United States Supreme Court has consistently held that the government must provide *some* kind of hearing where an individual can challenge the deprivation in a "meaningful" manner. *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). *See also Mathews v. Eldrich,* 424 U.S. 319, 333 (1976).

At the outset of any due process analysis, the court must find the deprivation of a constitutionally protected liberty or property interest. *Board of Regents v. Roth,* 408 U.S. 564, 572-73 (1971). This property interest need not find its origin in the Constitution, so long as it is of the type, and of the magnitude contemplated by the Constitution. *Goss v. Lopez,* 419 U.S. 565 (1975).

As the Court has previously determined, plaintiff has not been deprived of a constitutionally protected liberty or property interest. However, even if plaintiff had proven a constitutional deprivation, his procedural due process claim could not survive summary judgment.

Plaintiff claims that he has been deprived of a hearing on the legislation or a chance to clear his name prior to passage of the legislation. However, the Court holds that plaintiff was provided with adequate due process. Prior to the passage of the Resolution and Ordinance, the law director sent plaintiff a letter outlining the questions about the residency issues and offering plaintiff the opportunity to come forward and present proof that he was in compliance with the charter. Plaintiff chose not to respond. Further, plaintiff was present at the council meeting when the legislation was passed. Several citizens rose to speak out against the legislation, but plaintiff chose not to do so, despite the fact that he would have been provided the opportunity upon request.

The Court finds that plaintiff was provided at the council meeting with "an opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews, supra* at 333. Since he chose not to exercise his right to a hearing, he cannot now be said to have been denied such a right. Defendants are granted summary judgment on plaintiff's procedural due process claim.

C. Equal Protection.

Plaintiff also, using general and vague language, plead a claim of violation of his equal protection rights.

Specifically, plaintiff states in his First Amended Complaint that:

> 63. The Defendants, separately individually, in concert and under color of law deprived Plaintiff of his constitutional rights to:
>
> (e) Equal protections of the law as guaranteed under the Fourteenth Amendment . . .

The plaintiff never develops his equal protection claim in the First Amended Complaint or in his responsive filings. In fact, plaintiff does not mention this claim in any of his briefs.

"To state a claim under the Equal Protection Clause, a §1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class. *Henry v. Metro. Sewer Dist.*, 922 F.2d 332, 341 (6th Cir. 1990), *quoting, Johnson v. Morel*, 876 F.2d 477, 479 (5th Cir. 1989) (*en banc*). "The equal protection concept does not duplicate common law tort liability by conflating all persons not injured into a preferred class receiving better treatment than a plaintiff who alleges tortious injury." *Booher v. United States Postal Service*, 843 F.2d 943, 944 (6th Cir. 1988) (*citations omitted.*

Plaintiff has not alleged or demonstrated that he was a member of a distinct class which the Garfield Heights city officials treated differently. Plaintiff's claim is merely that he was mistreated by the defendants. While such mistreatment may have violated other constitutional rights, it does not amount to an equal protection violation. Defendants are granted summary judgment on plaintiff's equal protection claim.

D. Bill of Attainder.

In his Amended Complaint, plaintiff raised for the first time the issue of whether the Ordinance and Resolution adopted by the city council operated as a bill of attainder in violation of Article I, Sec. 9, Cl. 3 of the United States Constitution. A bill of attainder is a "law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 846-47 (1984), *quoting, Nixon v. Administrator of General Services*, 433 U.S. 425, 568 (1977). *See also United States v. Brown*, 381 U.S. 437, 442 (1965). "In analyzing challenged legislation, the Court has applied a 'functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further non-punitive legislative purposes.' " *Gardner v. City of Columbus, Ohio*, 841 F.2d 1272 (6th Cir. 1988), *quoting, Nixon, supra* at 475-76.

The Sixth Circuit, in recent cases, has addressed the issue of unlawful bills of attainder. In *Gardner v. City of Columbus, Ohio*, 841 F.2d 1272 (6th Cir. 1988), the court held that civil ordinances governing fines to be imposed for illegal parking were not bills of attainder because they were not punitive in nature. The Court noted that the purpose of the fines is not to punish but rather is a "part of a comprehensive regulatory scheme [to] defray the cost of providing and regulating parking on city streets." *Id.* at 1278.

The Court revisited the issue of bills of attainder in *Song v. City of Elyria, Ohio*, 985 F.2d 840 (6th Cir. 1993). In *Song*, the plaintiffs, female owners and operators of massage parlors, challenged an ordinance which prohibited non-licensed individuals from giving massages to members of the opposite sex.[3] In finding that the ordinance was not an unlawful bill of attainder, the court noted that the legislation was not targeted at one individual, or a small group of people, but applied equally to all citizens.

The Resolution and Ordinance in question represents a classic case of a bill of attainder. Unlike the legislation passed in *Song*, the Ordinance passed by the Garfield Heights city council does not apply to all citizens equally, but rather is directed at and applies to one individual, namely the plaintiff.

While the defendants agree that the Ordinance and Resolution is directed solely at plaintiff, defendants maintain that the legislation is not punitive, but rather "demonstrates an intent to enforce the residency requirement of the charter so that future candidates will appreciate the importance of that provision." Defendants' reply brief at 15.

However, from the very language of the Resolution the inference can be drawn that the legislation was passed for retributive reasons. The Ordinance states that the Law Director may take "whatever action is necessary, *legal or otherwise*, . . . " to recover plaintiff's salary. (emphasis added). This *legal* or *otherwise* language, along with the council's decision to publish the Ordinance and

---

[3] The Court referred to this practice as "cross massaging."

Resolution in local newspapers, evinces a desire to punish plaintiff by confiscating his property without benefit of trial.[4] In fact, defendants admit that, in addition to recovering plaintiff's pay, the Resolution was passed to express "council's outrage with Zilich's violation of the Charter." Defendants' brief at 17. Once again, leading to the inference that the defendants' purpose in passing the legislation was punitive in nature.

Further evidence suggests, that at the very least defendants Mack, Longo, Spiegelberg and Stacheicz supported the passage of the Ordinance and Resolution in order to punish plaintiff for exercising his First Amendment rights to free speech. In deposition testimony, Thomas Furth, a former assistant law director for the City of Garfield Heights, stated that several defendants, including the mayor and the law director, met on several occasions to discuss ways to prevent plaintiff from challenging certain political issues, such as the mayor's budget proposal, and to punish plaintiff for past attempts to oppose such issues. *See* Appendix at 1.[5] Furth was present

---

[4] Defendants suggest that the plaintiff will not be deprived of his property absent a trial since the plaintiff will only be ordered by this Court to return his salary if the defendants are successful in their counter-claim. This position lacks merit. The issue in plaintiff's bill of attainder claim is not the counter-claim, but rather is the Ordinance and Resolution. Regardless of the counter-claim, the Ordinance and Resolution was passed without the benefit of trial, and remains an enforceable piece of legislation.

[5] After the plaintiff noticed the defendants of the taking of Mr. Furth's deposition, defendants moved for a protective order to prevent the plaintiff from attending the deposition. Mr. Furth's deposition was taken June 1, 1992. Defendants' motion

at these meetings and testified that the mayor expressed the desire of using the residency requirement to "shut up Zilich"; and ruin him politically. *See* Appendix at 1 and 2. Furth further testified that a number of the defendants had stated that they recognized that plaintiff had not violated the residency requirement, but that it was their intent to use the issue to drive plaintiff out of politics. *See* Appendix at 3.

This evidence also lends itself to the reasonable inference that the legislation was passed with punitive reasons in mind. Finding genuine issues of material fact, the Court denies defendants' motion for summary judgment on plaintiff's bill of attainder claim.

1. Qualified Immunity.

Finding that defendants are not entitled to summary judgment on plaintiff's bill of attainder claim, the Court

---

for a protective order was granted, and pursuant to the Court's Order of that same day, only counsel, Mr. Furth and the court reporter were present. In its January 25, 1993 Order, the Court modified the protective order to allow the parties to examine the transcript from the deposition. The Court further allowed the parties to make general references to the deposition in their dispositive motions. Upon review, the Court finds that Mr. Furth's deposition testimony does not include privileged information. As such, the Court vacates its Order and lifts the modified protective order.

In the body of this Memorandum Opinion, when referring to Mr. Furth's deposition, the Court will only provide a summary of Mr. Furth's testimony, but will include a specific reference to the deposition. An accurate recounting of the specific testimony in question will be attached to this Memorandum Opinion as an Appendix.

now turns its attention to the defendants' qualified immunity defense. Without much discussion, the defendants argue that they are entitled to qualified immunity.

When individuals wrongfully suffer injuries at the hands of public officials, "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). However, there is a countervailing concern that people will be discouraged from seeking employment in government positions, if, in the exercise of their duties, they can incur substantial personal liability for their actions. *Id.* As a result, courts developed immunity to protect public actors from liability in certain circumstances.

Absolute immunity is generally reserved for government employees performing judicial and legislative functions. *Stump v. Spuekman*, 435 U.S. 349 (1978) (immunity for federal employees); *Tenney v. Brandhove*, 341 U.S. 367 (1951), *reh. den.*, 342 U.S. 843 (1951) (immunity for state employees); and *Haskell v. Washington Township*, 864 F.2d 1266 (6th Cir. 1988) (immunity for municipal employees).[6]

In its June 24, 1992 Memorandum Opinion and Order, the Court held that defendants were not entitled to absolute immunity. The Court denied absolute immunity on the grounds that their conduct in passing and publishing the Resolution and Ordinance was not legislative, but

---

[6] Although the United States Supreme Court has yet to address the issue, at least eight circuit courts, including the Sixth Circuit, have extended absolute immunity to local legislators for actions taken in their legislative capacity. *Aitchison v. Raffiani*, 708 F.2d 96 (3rd Cir. 1983); and *Kuzinich v. County of Santa Clara*, 689 F.2d 1345 (9th Cir. 1982).

rather was administrative in nature because it was directed at only one individual, plaintiff George Zilich. *Haskell, supra;* and *Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984). While courts have been unwilling to completely insulate government officials from conduct that is executive or administrative, "good faith" or *qualified* immunity is available to shield government employees under certain circumstances.

In evaluating a claim of qualified immunity, the court must determine whether the government actor violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As a threshold matter, the court must first evaluate whether the plaintiff has asserted a violation of a constitutional right at all. *Siegert v. Gilley*, ___ U.S. ___, 111 S.Ct. 1789 (1991). Assuming that the plaintiff has stated or proven a constitutional claim, the second part of the qualified immunity analysis requires an inquiry into whether the claim is based on constitutional rights which "were clearly established at the time of the conduct at issue." *Davis v. Scherer*, 468 U.S. 183, 197 (1984). "A right is 'clearly established' when the contours of that right are sufficiently clear that a reasonable [officer] would understand that what he is doing violates that right." *Bettio v. Village of Northfield*, 775 F. Supp. 1545, 1550 (1991), *citing, Creighton, supra*, at 640. It is the defendants' position that plaintiffs' claim fails under each prong of the qualified immunity test.

On several occasions throughout their various motions, the defendants have noted that under the charter they, as councilmembers, have the right to pass judgment upon the qualifications of their fellow members.

Chapter 11 of the Garfield Heights City Council Charter. This right, however, does not give councilmembers the license to deprive an individual of his property without the benefit of trial, nor would a reasonable councilmember believe it to be so. The right to trial, in both criminal and civil actions is a basic fundamental right and is the cornerstone of our justice system. Finding the potential violation of a clearly established right, the defendants are denied qualified immunity on plaintiff's bill of attainder claim.

E. First Amendment.

In his final cause of action, plaintiff claims that in passing the Resolution and Ordinance, the defendants violated his first amendment right to free speech. Plaintiff states that "the Defendants acting under the color of their official positions and under the color of Ordinance 112-1991 and Resolution 54-1991, threatened the plaintiff and his family, attempted to intimidate him and acted in retaliation against him for his public criticism of the City's administration." Plaintiff's brief in opposition at 12. Plaintiff claims that in addition to adopting and publishing the legislation in question, the defendants caused harassing telephone calls to be placed to his home, windows in his car to be shot out, his home to be vandalized, and his tires to be slashed immediately following a council meeting wherein plaintiff had spoken out against the mayor's proposed budget. It is plaintiff's position that these actions were taken in an effort to punish plaintiff for publicly opposing the Mayor, and prevent him from doing so in the future.

The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States,* 354 U.S. 476 (1957). Nowhere is this right to freedom of expression more important than in government, on the national level, state, or local. "The Court has frequently reaffirmed that speech on public issues occupies the 'highest rung on the hierarchy of First Amendment values,' and is entitled to special protection." *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 913 (1982).

Further, the First Amendment also forbids the imposition of retaliatory sanctions designed to punish the legitimate exercise of First Amendment rights. *Perry v. Sindermann,* 408 U.S. 593 (1971). The prohibition against retaliatory sanctions has been applied to a municipality's retaliation against an individual for his exercise of his first amendment rights. *Hall, supra;* and *Little v. North Miami,* 805 F.2d 962 (11th Cir. 1986).

Defendants contend that "Zilich's argument that the legislation was passed in retaliation for his First Amendment expression is merely his assumption." Defendants reiterate their intent of recovering plaintiff's salary due to his intentional violation of the residency requirement, and their desire to prevent future candidates from violating the requirement as their narrow focus in adopting the legislation.

Further, defendants note that there is no direct evidence linking any of the defendants with the threats and acts of destruction. As for plaintiff's claims that the defendants conspired to "destroy plaintiff's vocation, intimidate him, break his legs, slap him around, cut him,

etc.," the defendants point out that there is no evidence of actual efforts to carry out these plans. At best, defendants insist that plaintiff can only establish that certain defendants held several meetings wherein they "spoke of harm coming to Zilich without actually taking action to accomplish it . . . " Defendant's supplemental brief at 9. Defendants also maintain that any conversations directed at harming plaintiff, his family, or his property were made in jest.

As the Court has already observed, the very language of the of the [sic] Resolution, the council's decision to publish the Resolution, and the testimony of Tom Furth that several defendants, including certain councilmembers, indicated that they pursued the residency issue solely to harass plaintiff raise the inference that the legislation was passed to punish the plaintiff. *See* Appendix at 2 and 3. Furth also testified that certain defendants stated that they planned to make harassing phone calls to the plaintiff and his wife, intimidate plaintiff's wife, and bring physical harm to the plaintiff. *See* Appendix at 4. Further, despite the defendants' representation, Furth testified that none of the threats were made in a joking manner. The fact that the defendants admit that they spoke of injuring the plaintiff and destroying his property, along with the fact that plaintiff's property was damaged and he did receive threatening phone calls leads to the reasonable inference that the defendants were responsible. *See* Appendix at 6.

1. Qualified Immunity.

As previously emphasized in this Opinion, the First Amendment protects one of our most fundamental constitutional rights, free speech. *Thornhill v. Alabama,* 310 U.S. 88 (1940). The Sixth Circuit has echoed this sentiment. *See Eaton v. Newport,* 975 F.2d 292 (6th Cir. 1992). Certainly, then, the right to express one's opinion free from retaliatory conduct is one that qualifies as a "clearly established right" for purposes of qualified immunity. Because this right is one so cherished in our country, it is fair to conclude that the reasonable person would have recognized that passing legislation aimed at preventing someone from expressing his ideas in a public forum, or punishing an individual for having done so in the past would be a constitutional violation of great magnitude. The Court finds that plaintiff has overcome the defendants' qualified immunity defense on his first amendment claim.

F. Defamation.

Plaintiff also brings a defamation claim against the defendants claiming that the "intentional disregard" language contained in the Ordinance and Resolution portrayed him in a negative light.[7] In their motion for

---

[7] Specifically, the resolution states:

> *SECTION ONE*: The Mayor and this Counsel [sic], on behalf of the residents of the City of Garfield Heights, join together to express their disapproval and outrage over the intentional disregard of Section 9 of the Charter of the City of Garfield Heights by former Councilman George

summary judgment, the defendants assert that plaintiff's defamation must fail for two reasons: first, plaintiff cannot establish the requisite malicious intent as all of the defendants believed at the time of publication and still believe today that plaintiff violated the residency requirement; and second, plaintiff did violate the residency requirement and the truth is an absolute defense to defamation. *Patio World v. Better Business Bureau, Inc.*, 43 Ohio App. 3d 6 (1989).

Both the plaintiff and the defendants agree that the appropriate test to apply in evaluating the language used in the legislation was first articulated in *New York Times v. Sullivan*, 376 U.S. 254 (1964). In *New York Times v. Sullivan*, the Court held that in order to prevail on a defamation claim, a public official must demonstrate by clear and convincing evidence that the false statements were made with "actual malice." The Court held that false statements are made with actual malice if they are made with knowledge of falsity or with reckless disregard for truth or falsity. *Id.*

Ohio courts have also had opportunity to define "actual malice." In *Varanese v. Gall*, 35 Ohio St. 3d 78 (1988), *cert. denied*, 487 U.S. 1206 (1988), the court explained:

> [T]he concept of actual malice in defamation cases involving public officials is separate and

---

- Zilich during his tenure as Councilman, and demand that he return all compensation given to him in remuneration for his service as Councilman because of his being in violation of this provision of the City Charter.

> distinct from the traditionally defined common-law standard of malice or actual malice. Actual malice in the context of defamation may not be inferred from the evidence of personal spite, ill will, or deliberate intention to injure, as the defendant's motive for publishing are irrelevant. A defamation plaintiff who is required to show actual malice must demonstrate with convincing clarity that the Defendant published a defamatory statement either with actual knowledge that the statement was false, or with a high degree of awareness of its probable falsity.

Id. at 80. *See also Perez v. Scripps-Howard Broadcasting Co.*, 35 Ohio St. 3d 215 (1988), *cert denied*, 488 U.S. 870 (1988).

Defendants maintain that each individual defendant was convinced of the truth of the statements contained in the Resolution and Ordinance, and that each defendant relied on reliable documentary and other physical evidence in arriving at their conclusion. As a starting point, the defendants note that plaintiff, himself, admitted under oath in 1989 that he purchased a home in Garfield Heights in July, 1987.[8] The purchase of this residence was only two and one half years prior to the election, making plaintiff ineligible to serve on city council.

The defendants also refer to Law Director Mack's letter to plaintiff in which he raised the issue of residency

---

[8] Plaintiff testified during the course of a trial in which he was a named defendant. Shortly after the election, the incumbent councilmember plaintiff unseated, Corey Rogers, brought suit against plaintiff challenging his qualifications to hold office. The trial court dismissed the action finding that plaintiff was already a councilmember, and that he had not been properly served before he was sworn into office.

with plaintiff, and invited plaintiff to furnish him with documentation demonstrating that he met the three year requirement, but plaintiff failed to respond. Defendants also cite to several occasions where plaintiff had opportunities to defend his fitness to serve as a councilmember, but failed to do so.[9]

Several councilmembers also received anonymous packets of information containing copies of plaintiff's voter registration records and records showing the date on which he took title to his Garfield Heights home. The voting records showed that plaintiff was registered to vote in Bedford Heights in January, 1987 and that he had acquired title to his Garfield Heights home in July, 1987. Again demonstrating that plaintiff had not lived in Garfield Heights for three consecutive years prior to the election in November, 1989.

---

[9] One such opportunity occurred on March 11, 1991, at a City Council Meeting. Three citizens raised questions about Zilich's residency. According to defendants, plaintiff did not address their questions. Further, defendant Joseph Suster twice asked Zilich the question of whether he had been a resident of Garfield Heights three years prior to the election, on November 8, 1986. Zilich refused to answer Suster's question, but claimed that he had lived in Garfield Heights off and on for over thirty years and that that was longer than some of the people on Council.

At the June 11, 1990 Council Meeting, a citizen, Dan Nichols, asked the Council to conduct an investigation into Zilich's qualifications. The defendants note that "Zilich spoke at length about Nichols' question, but *never* said whether he met the residency requirement. Defendants' brief at 7. (emphasis in original).

The defendants claim that based upon the above-mentioned evidence, it was reasonable to believe that plaintiff had intentionally violated the residency requirement. As such, defendants argue that plaintiff cannot demonstrate the necessary actual malice in order to maintain his defamation claim.

However, the Court rules that plaintiff has made a sufficient showing to survive summary judgment on his pendent state action for defamation. First, plaintiff challenges the defendants' position that plaintiff had, indeed, violated the residency requirement. Plaintiff notes that before November 8, 1987, the residency requirement for serving on city council was only one year. In June, 1986 plaintiff moved into his parents home in Garfield Heights with the intent to purchase a home in Garfield Heights. Therefore, plaintiff argues that he was "a resident grandfathered under the one year residency requirement." Plaintiff's brief in opposition at 5. Plaintiff also maintains that because he was living in Garfield Heights in June, 1986 with the intent to stay, he satisfied the three year residency requirement. Without passing on plaintiff's fitness to serve on council, the Court finds that plaintiff has raised genuine issues as to whether he violated the Garfield Heights City Council Charter.

Finding that plaintiff was able to demonstrate factual disputes as to whether he did, indeed, violate the residency requirement, the Court turns its attention to the issue of whether plaintiff can offer evidence that the statements, if false, were made with actual malice. The feelings of the various defendants toward the plaintiff are irrelevant to this analysis. *Varanese, supra.* What is significant is the information available to the defendants with

regards to plaintiff's situation, as well as whether information could have been available to the defendants upon a reasonable investigation.

Plaintiff insists that his testimony in the Corey Rogers trial was not evasive, and that he succinctly and accurately explained his reasons for believing that he had not violated the residency requirement. Plaintiff notes, and several of the defendants admit in their brief, that they read the Rogers transcript and relied on it in forming their collective opinion that plaintiff had violated the Charter. Plaintiff argues that his testimony, alone, would have alerted the councilmembers that there was a question as to whether he really had violated the Charter.

Plaintiff also notes that on April 26, 1990, more than one and one half years before the legislation was passed, defendant Law Director Mack sent a letter to the Cuyahoga County prosecutor's office regarding the issue of plaintiff's compliance with the residency requirement. Plaintiff highlights Assistant County prosecutor Michael Butler's response letter of May 9, 1990 which included the reference to the retroactive application of the three year residency requirement and included the conclusion that Zilich believed that he had met the residency requirement.

However, plaintiff relies primarily on the testimony of Tom Furth who stated that a number of the defendants continued to pursue the "residency issue" despite the fact that they knew it was "legally a dead issue." *See* Appendix at 3. Furth testified that two law firms were employed by the City to research the issue, but that neither one was

able to demonstrate that plaintiff had violated the residency requirement. *See* Appendix at 7. Furth further testified that, despite this evidence, the defendants passed the legislation in order to "ruin plaintiff politically." *See* Appendix at 1 and 2. Plaintiff argues that Furth's testimony establishes that the defendants either knew that plaintiff had not violated the residency requirement, or at least should have suggested to them that the issue need further investigation.

Plaintiff has made a sufficient showing for purposes of summary judgment that the statements contained in the Resolution and Ordinance were false and that such statements were made with knowledge of their falsity or a reckless disregard for their truth or falsity. As such, defendants' motion for summary judgment on plaintiff's defamation claim is denied.

V. CONCLUSION

For the foregoing reasons, defendants' motions for summary judgment on plaintiff's substantive and procedural due process and equal protection claims are granted. Summary judgment is denied on plaintiff's bill of attainder, First Amendment, and defamation claims. Defendants are also denied qualified immunity on plaintiff's bill of attainder and First Amendment claims.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U. S. District Judge

APPENDIX

The following are excerpts of and references to the transcript of the deposition of Thomas Furth taken on June 1, 1992.

1) Furth testified that in a meeting conducted in March, 1990 that "Director Obert [Financial Director Richard Obert] was talking about George Zilich and how he has to be stopped and that there have to be ways to stop him. The Mayor indicated that maybe it was time to sick Spiegelberg on Zilich." Depo. at 41.

Furth testified that in early 1990 Mayor Longo indicated that "George Zilich is a very dangerous man. He's far more dangerous than the bums that were thrown out of council because they were stupid and George was smart. That makes him dangerous. That if George Zilich didn't shape up and respond to a meeting or meetings that the Mayor was going to have with him when he was going to make clear how he needed to behave, then they would get rid of him." Depo. at 35.

Immediately follow a councilmeeting in August, 1990 Furth met with Mack, Longo, Spiegelberg and Stachewicz to consider ways to "destroy Zilich." Depo. at 96. One such way discussed was to encourage Andrew Douglas, Associate Justice of the Ohio Supreme Court, and Furth's uncle, to place pressure on the Republican party to drive plaintiff out of politics. Depo. at 99.

2) Furth testified that a series of meetings were held to determine how to prevent plaintiff from opposing the Mayor and his plans. "What the Mayor said was that politically he had to find a way to deal with George

Zilich, and the way that they were looking at hitting him initially was on his residency and issues surrounding his residency in his ward in the City of Garfield Heights." Depo. at 28.

In a March 1990 meeting, Mayor Longo indicated that "even though the residency was probably a dead issue legally, it wasn't a bad issue politically and the more bad will they could stir up for George city wide, and particularly in his ward the better, because it might chase him out of town." Depo. at 43

Furth testified that in April, 1990 Mack and Longo indicated that they planned to use the residency issue to drive plaintiff out of politics and out of Garfield Heights. Depo. at 56.

3) In a March 1990 meeting, Mayor Longo indicated that "even though the residency was probably a dead issue legally, it wasn't a bad issue politically and the more bad will they could stir up for George city wide, and particularly in his ward the better, because it might chase him out of town." Depo. at 43.

In an April 1990 meeting at the restaurant Cleveland PM, with Furth, Mayor Longo, Director Obert, and Barbe McCloskey, the director of senior citizens' activities in Garfield Heights, "the conversation was that George Zilich needed to be stopped and the residency issue needed to become a public issue, a political issue, even if it was no longer a legal issue. Depo. at 45.

4) On one occasion, defendant Spiegelberg told Furth that a dirty tricks compaign against Furth had been initiated and that harassing phone calls were going to be

placed "at all hours of the evening to George's house . . .- particularly when his wife was home and he wasn't." Depo. at 94.

Defendant Spiegelberg also told Furth "Well, we are going, we are going to concentrate on terrorizing, his word [sic], terrorizing or intimidating his wife when he's not around. He travels a little bit, and we are going to find out when he's traveling so that we can intimidate his wife. Depo. at 77.

Furth testified that Mayor Longo indicated that "he had taken care of other people before. He said that he was going to take care of George Zilich. He told me that he might need my help in this. . . .

He then switched to the topic of George Zilich's wife. He, and this is something that in these words I had not, I have not mentioned to anybody before. He indicated that George's wife was a whore and that what she needed was a good fuck because obviously George Zilich couldn't provide that.

Well, how would she feel and how would George feel if he found some people that could provide that and dragged her out of her house and took care of her, and that maybe then pretty boy and the Barbie-doll couple would be out of Garfield Heights once and for all and understand that the people of Garfield Heights are not like them. . . . " Depo. 110-111.

5) Furth testified that Mayor Longo said to him that "for being a smart person [plaintiff], he was acting dumb because he wasn't getting the message that serving on the council for opposing mayor wasn't worth it, so he was

going to talk to friends or maybe ask me or Spiegelberg to talk to people, also, but that he was going to, going to get the message to George one way or the other and what he [plaintiff] needed was his legs broken and then maybe he wouldn't find it worth it anymore, and that if something happened to his wife or something happened to George where he couldn't walk anymore, then maybe the fair-haired boy and the fair-haired couple of Garfield Heights would be finished once and for all.

He then said another alternative would be cutting him, and I looked at him and he said, You didn't know that? He said, all we have really got to do is get him in a fight with somebody who can't be traced back to us and cut him.

I said, Cut him?

He said, Yeah, because he's a bleeder.

I said, He's a what?

He's a bleeder, said the Mayor. He's one of those people that has a disease where you bleed excessively if you're cut." Depo. at 113-114.

6) Furth testified that when Mayor Longo discussed plans to harass and intimidate plaintiff's wife that it was a serious conversation and that Mayor Longo was not joking when he expressed his desire to harm plaintiff's wife. Depo. at 111.

- In response to a question regarding a statement made by Director Obert that the defendants should pursue the issue of "cutting plaintiff because he is a *bleeder,*" Further [sic] testified "I, in this conversation I'm referring to or any

other time, never saw anybody joke about George Zilich in any way." Depo. at 131.

7) Furth testified that the defendants hired the Cleveland law firm of Arter & Hadden, and a law firm in Washington D.C. to research the residency issue. Depo. 29. Furth further testified that despite their efforts, they were unable to develop a case against plaintiff on the residency requirement.

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

George Zilich, Plaintiff, vs. The City of Garfield Heights et al., Defendants.	)	CASE NO. 1:92 CV 188 JUDGMENT ENTRY (Filed Apr. 27, 1993)

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that defendants' motions for summary judgment on plaintiff's substantive and procedural due process and equal protection claims are granted. Summary judgment is denied on plaintiff's bill of attainder, First Amendment, and defamation claims. Defendants are also denied qualified

immunity on plaintiff's bill of attainder and First Amendment claims.

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge